In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES, PETITIONER,
v.
WONG YOU, WONG CHEEN ET AL, } No. 597.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These Chinamen, by their attorney, applied to the United States District Court for the Northern District of New York for a writ of habeas corpus, alleging that they were Chinese persons born in the United States and citizens thereof, and were unlawfully restrained of their liberty and detained by Silas W. Horton, Chinese inspector of the United States, at Malone, New York. (R., 1.)

The writ issued (R. 2), and Horton made a return, in which he alleged, in substance, that these Chinamen had surreptitiously entered the United States from the Dominion of Canada, some on October 22

and the others on November 28, 1909, at certain points in the Northern District of New York, without having produced the certificate of admission or having been examined or inspected as required by the immigration laws and regulations; that they entered at a point not designated as a port of entry under the immigration laws and regulations; that a day or two after their respective entries they were arrested by warrant of the Secretary of Commerce and Labor and taken before the officers named therein; that they were given full opportunity to show cause why they should not be deported, and were advised of their right to be represented by counsel and to inspect all the evidence upon which the Secretary of Commerce and Labor had acted in directing their arrest; that the Chinese inspector and inspector of immigration who conducted such inquiry and examination, after due consideration, found that said Chinamen were aliens and had entered the United States without inspection or examination under the immigration laws, the place of entry not being designated as a port of entry under the immigration laws, and that they were in the United States in violation of law; that the record of the proceedings before the immigration officer was forwarded to the Secretary of Commerce and Labor, said Chinamen being given opportunity to inspect the same and make a copy thereof, and that the Acting Secretary of Commerce and Labor, upon a consideration of such record, found that they were aliens and had entered the United States in viola-

POOR C

tion of section 36 of the act of February 20, 1907, and rule 24 of the immigration regulations without being inspected under any of the various provisions of the said act; that the period of three years after such landing had not elapsed, and that the Acting Secretary of Commerce and Labor had issued warrants of deportation in their cases, by virtue of which the respondent held them (R. 3–6).

Accompanying the return were the warrants of arrest and the testimony and proceedings had and taken under them (R., 4, 6 et seq.).

The testimony before the Chinese and immigration inspector fully supports his finding and that of the Acting Secretary of Commerce and Labor that said Chinamen were aliens and had surreptitiously entered the United States. It shows that the respondents Wong You, Wong Cheen (Wong Chung), and Hoen or Hom Chee, were brought by two white men in an automobile from Montreal, Province of Quebec, to some town on this side of the Canadian boundary (R., 11–12, 19, 22, 23), where they took a train, upon which they were later arrested at Utica, N. Y. (R., 8, 16–17, 21). They were to pay $150 to $170 each for being brought into this country and put into some town, said by one to be Boston (R., 12, 19, 24). Such testimony also shows that Wong Mow Sue and Ju Fong likewise entered the United States from Canada and were taken into custody while on a canal boat at Rouses Point, N. Y. (R., 25, 26, 30, 31, 33.)

R COPY

The District Court dismissed the writ of habeas corpus as to Hoen or Hom Chee, because his case had not been passed upon by the Secretary of Commerce and Labor (R. 49).

The writ was also dismissed as to the other petitioners, and they were remanded to the custody of the immigration inspector in charge of the detention station at Malone, N. Y., to be dealt with according to law (R., 49–58).

Upon appeal, the Circuit Court of Appeals reversed the judgment of the District Court and ordered the Chinamen released from custody (R., 61–64). The case is now before this court on writ of certiorari granted at the last term.

ARGUMENT.

I.

There is no question as to the facts of this case, which show that these Chinamen are aliens and, a day or two previous to their arrest, surreptitiously entered the United States across the Canadian border at other than a designated port of entry under the immigration laws. Considering them simply as aliens, and subject like other aliens to the provisions of the immigration laws, and particularly to section 36 of the act of February 20, 1907, which authorizes the Secretary of Commerce and Labor to deport any alien who shall enter the United States except at the seaports thereof or such place or places as he may designate, they were arrested and ordered deported by the immigration authorities, after having first been accorded a full and fair hearing. Under these circumstances, if the immigration laws apply to them, the action of the Secretary can not be questioned by the courts. (*Chin Yow* v. *United States*, 208 U. S., 8, 13.)

The District Court (Judge Ray), in a carefully considered opinion, held (R. 49, 51):

> 1. These persons are aliens.
>
> 2. They entered the United States surreptitiously, not at a port of entry, and without inspection or examination. They

R COPY

entered in defiance and in violation of law. They came with the intention of remaining.

3. They placed themselves in the United States by violating our laws; by their own unlawful acts, and can not, therefore, be heard to say they are not here in violation of law, or unlawfully.

4. They came into the United States in violation of the immigration act or laws, and, being aliens, were and are subject to its provisions.

5. Chinese aliens are not exempt from the provisions of the immigration laws, rules, and regulations.

6. The two acts may be enforced together and are not inconsistent with each other. The immigration act does not repeal the Chinese exclusion laws or any part thereof.

The District Court also held that, as the record showed that these Chinamen had left China for the purpose of coming to the United States through Canada, China and not Canada was to be deemed the place from which they came within the meaning of the immigration act, and they were properly ordered to be deported to China by the Secretary of Commerce and Labor. This latter question was not considered by the Circuit Court of Appeals in its opinion, and we do not think it necessary to add anything to the well-reasoned opinion of the District Court upon this point.

The Circuit Court of Appeals held that the immigration act, " although in its terms including all aliens, applies only to those Chinese aliens who are

not subject to removal by the particular Chinese enactments" (R., 63); that "it appears from the meager record that these petitioners are Chinese laborers and—if the Government's contentions be well founded—that they are aliens and subject to deportation in accordance with the provisions of the statutes relating to the Chinese" (ib.), and that, "if this contention of the Government be well founded, we have two statutes in force prescribing different methods of procedure for the deportation of alien Chinese laborers" (ib.).

It thus appears that the Circuit Court of Appeals proceeded upon the assumption that the Government was trying to deport these Chinamen under the immigration act as alien Chinese *laborers* unlawfully within the United States. This is wholly incorrect. The record shows that they were ordered deported simply because they were *aliens* who had entered the United States without inspection at other than designated ports of entry under the immigration laws. Anything in the record indicating that they were laborers, and possibly also subject to deportation under the Chinese exclusion laws, was only brought out incidentally in the course of the hearing given them by the inspector.

Petitioners were not and could not have been arrested within the country and ordered deported by the Secretary of Commerce and Labor under the immigration laws simply because they were Chinese laborers. Chinese *laborers*, unlawfully within the United States, can only be arrested and de-

COPY

ported *as such* under the exclusion laws. There is therefore no occasion for the application of the rule *generalia specialibus non derogant,* relied on by the Circuit Court of Appeals.

The error of the appellate court's view becomes apparent in considering the case of Chinese laborers who are brought into the United States in violation of the alien contract labor provisions of the immigration laws. Manifestly, it would be no valid objection to the deportation under those laws of an alien contract laborer that he was a Chinaman and also subject to deportation under the Chinese-exclusion laws. It is for the Government to elect under which law it will proceed in such a case.

But while holding that petitioners were unlawfully held under the immigration laws, the Circuit Court of Appeals said (R., 64):

> If, however, proceedings should be instituted under the Chinese statutes and it should be made to appear that the petitioners are not subject to deportation thereunder, this opinion and the discharge of the petitioners in the present proceeding will not prejudice the institution of another proceeding under the immigration act.

The substance of the judgment of the Circuit Court of Appeals is, therefore, that whenever a Chinese alien is found to have entered or to be within the United States in violation of the immigration laws, and there is some ground to believe that

he is a Chinese laborer and therefore subject to deportation under the Chinese-exclusion laws, the Government must first settle that question through the judicial proceedings provided for by those laws before it can undertake to deport him under the immigration laws. In other words, although the Chinese alien may be subject to deportation under both laws, the Government is compelled to proceed first under the Chinese-exclusion laws in the case of Chinamen who are apparently laborers.

II.

The application of the immigration laws to Chinese aliens is well settled.

The immigration act of March 3, 1893 (27 Stat., 569,571), provided:

> That this act *shall not apply* to Chinese persons.

In the immigration act of March 3, 1903 (32 Stat., 1213, 1221), section 36, and in the act of February 20, 1907 (34 Stat., 898, 911), this clause was changed to read:

> That this act shall not be construed *to repeal, alter, or amend* existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent.

This change indicates the intent of Congress that the immigration act should apply to Chinese aliens, although not affecting the operation of the exclusion laws, and such has been the practical and judicial construction of this legislation.

In an opinion rendered June 24, 1903, Attorney General Knox, in holding that the immigration act of March 3, 1903, authorized the exclusion of a Chinese alien afflicted with a dangerous and contagious disease, said (24 Op., 706, 708):

> To admit a Chinaman known to be suffering from a contagious disease, when another alien not so descended would be excluded because afflicted with the same disease, would to that extent defeat the legislative intent made clear by the terms of the act and apparently lead to unjust and unexpected results. "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention and, if possible, so as to avoid an unjust and absurd conclusion." (*Lau Ow Bew* v. *U. S.*, 144 U. S., 47.)

This view has been uniformly followed by the executive department and the courts.

> *Ex parte Lee Sher Wing*, 164 Fed., 506.
> *Looe Shee* v. *North*, 170 Fed., 566.
> *Ex parte Li Dick*, 174 Fed., 674, 176 Fed., 998.
> *Haw Moy* v. *North*, 183 Fed., 89.

In *Ex parte Li Dick*, 176 Fed., 1002, which was also a case of the surreptitious entry of a Chinese alien who was sought to be deported for violation of the immigration laws, District Judge Ray, referring to the provision of the immigration act that that act "shall not be construed to repeal, alter, or amend existing laws relating to the immigration or

POOR COPY

exclusion of Chinese persons or persons of Chinese descent," said:

> This is not a declaration that the act and all or any of its provisions are inapplicable to Chinese aliens. If they enter, they must enter at the designated ports of entry. If they enter, they must submit to the examination and inspection provided for all aliens. A Chinese anarchist, or a Chinese afflicted with one of the loathsome or infectious diseases mentioned in the act, is no more entitled to admission than is an Italian or Japanese alien. If a Chinese alien sees fit to enter surreptitiously and in violation of law, he is then illegally in the United States, and Congress has confided to the Department of Commerce and Labor the power and duty of ascertaining the fact and, if shown, of deporting the offender. In *Looe She* v. *North* (170 Fed., 572; 95 C. C. A., 646; and 24 Op. Atty. Gen., 706) this power, as to Chinese aliens, is upheld. This court considered the question in *Ex parte Li Dick* (D. C.), 174 Fed., 674, and on this point, after a full examination and further consideration, adheres to the proposition that a Chinese alien who surreptitiously enters the United States in violation of the immigration act may be deported under the provisions of that act, *and that such an entry so gained does not entitle him to a hearing before a United States judge or commissioner.* I do not think the law is in such shape that a Chinese alien who surrepti-

COPY

tiously enters, and thereby violates and evades compliance with the immigration law, thereby also evades the Department of Commerce and Labor and its jurisdiction to deal with him under the provisions of that act and becomes entitled to a trial and examination before a justice, judge, or a commissioner, under the provisions of the Chinese-exclusion laws. The two acts can stand and be enforced together. Two remedies may be provided for the same illegal act, and either, or, in some cases, both, enforced. If Congress had intended to exclude Chinese aliens from the operation of the immigration laws, it would have done so by apt words. It would have been easy to do so. We find no word or expression indicating such a purpose.

III.

The decision of the Circuit Court of Appeals operates to defeat some of the most salutary provisions of the immigration laws and to put a premium upon the surreptitious entry of Chinese.

One of the primary objects of the immigration laws is to exclude diseased persons. By section 2 of the act of February 20, 1907, "persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease" are denied admission into the United States, as well as persons physically or mentally defective. If a Chinese alien seeks to enter regularly at a designated port of entry, he is subjected, first, to an examination under the immi-

gration laws, and if found disqualified is refused admission. Rule 3 of the Regulations governing the admission of Chinese (see Appendix, p. 21) expressly provides for their examination under both the immigration and exclusion laws, and further that their status shall *first* be determined under the immigration laws. Under the ruling of the Circuit Court of Appeals, however, if a Chinaman who appears to be a laborer succeeds in having himself smuggled into the country, he must be allowed to remain here, although afflicted with a loathsome or dangerous contagious disease, until his right to remain under the exclusion laws is judicially determined. Thus, by his unlawful entry, he is allowed to imperil the health of the country in a way that he could not do if he had attempted to enter lawfully.

In defense of its decision the Circuit Court of Appeals says (R., 64):

> This conclusion makes no distinction in favor of the Chinese. Chinese laborers are excluded by the Chinese act. All other Chinese persons, not being excluded by that act, are subject to the provisions of the immigration act. A Chinese laborer, with or without a loathsome disease, can not enter at all. The Chinese act governs the case. A Chinese merchant would not be excluded by that act, but would be excluded by the immigration act if he had a loathsome disease or other disability prescribed in such enactment.

The statement of the Circuit Court of Appeals that—

> a Chinese laborer, with or without a loathsome disease, can not enter at all—

is no answer to the Government's position. It is true he can not enter *legally*, but he can and does enter *surreptitiously*, and the point is that under the ruling of the Circuit Court of Appeals, when he does so enter, he must be allowed to remain, although afflicted with a loathsome disease and ultimately subject to deportation under the immigration laws, until the question whether he is a laborer or not is judicially determined.

The Circuit Court of Appeals recognizes the application of the immigration laws to certain Chinese aliens, but holds that they do not apply to Chinese aliens who are laborers and excluded by the Chinese-exclusion laws. The Government, however, is not contending for the right of the Secretary of Commerce and Labor, under the immigration laws, to deport alien Chinese laborers as such, but simply that alien Chinese who have entered the United States without inspection, in violation of the immigration laws, may be deported under the former, if the Government shall so elect, without the necessity of first having it judicially determined whether the exclusion laws are also applicable to them.

The question presented in this case is one of considerable importance in the administration of both

the Chinese-exclusion and the immigration laws. It has been for years past the practice of Chinese aliens to enter the United States surreptitiously from Canada and Mexico. Judicial proceedings for their deportation under the Chinese-exclusion laws are attended with delay and for various reasons are frequently futile.

Once a Chinaman is smuggled in, the claim is made that he is a native-born citizen, and the delay attending judicial proceedings usually enables him to obtain abundant testimony to that effect. Thus, in this case, Wong You, who had admitted before the immigration inspector that he was born in China and that his mother and father were never in the United States (R., 9), asserts in his petition for the writ of habeas corpus that he was born in the United States (R., 1).

Manifestly, Chinese persons surreptitiously entering the United States are entitled to no special consideration, especially as the purpose of such surreptitious entry is to defeat the operation of the immigration as well as the Chinese-exclusion laws.

The construction contended for by the Government does not affect the rights to which Chinese within the United States are properly entitled under the exclusion laws. It merely enables the Governemnt to deal summarily with those entering the country surreptitiously, without inspection, in violation of the immigration laws. Chinamen who

have entered the country in the regular way, and therefore have passed the inspection provided for by the immigration laws, and Chinese who have been here such a length of time as to raise a presumption of lawful entry, must be dealt with under the exclusion laws.

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

WILLIAM R. HARR,
Assistant Attorney General.

APPENDIX.

STATUTES AND REGULATIONS.

The provisions of the immigration act of February 20, 1907 (34 Stat., 898), in pursuance of which the warrants of deportation were issued, are as follows:

> SEC. 36. That all aliens who shall enter the United States except at the seaports thereof, or at such place or places as the Secretary of Commerce and Labor may from time to time designate, shall be adjudged to have entered the country unlawfully and shall be deported as provided by sections twenty and twenty-one of this act. * * *
>
> SEC. 20. That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States. * * *
>
> SEC. 21. That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act or of any law of the United States, he shall cause such alien within the period of three years after landing or

22658—12——2

entry therein to be taken into custody and returned to the country whence he came, as provided by section twenty of this act. * * *

SEC. 43. * * * All acts and parts of acts inconsistent with this act are hereby repealed: *Provided,* That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent. * * *

Under the provisions of the immigration act, the following rule has been issued by the Department of Commerce and Labor:

RULE 24. *Ports of entry, Canada.*—In accordance with section 36, the following are named as Canadian border ports of entry for aliens; and any alien who enters the United States across such border at any other point shall be deemed to have entered the country unlawfully, and shall be arrested and deported under sections 20, 21, and 35 of said act, in the manner provided by rule 34 hereof: Eastport, Calais, Vanceboro, Fort Kent, Fort Fairfield, Van Buren, Houlton, and Lowelltown, Me.; Beechers Falls, N. H.; Island Pond, Newport, Richford, St. Albans, Swanton, and Alburg, Vt.; Rouses Point, Malone, Fort Covington, Nyando, Ogdensburg, Morristown, Clayton, Cape Vincent, Charlotte, Lewiston, Niagara Falls, and Buffalo, N. Y.; Detroit, St. Clair, Port Huron, and Sault Ste. Marie, Mich.; Duluth, Ranier, International Falls, Warroad, Beaudette, and Noyes, Minn.; Pembina, Neche, Walhalla, Portal, and St. John, N. Dak.; Sweet Grass and Gateway, Mont.; Porthill and Eastport, Idaho; Marcus, Oroville, Sumas, and Blaine, Wash.

POOR

The Chinese-exclusion act of May 6, 1882 (22 Stat., 58), as amended by section 1 of the act of July 5, 1884 (23 Stat., 115), and continued in force by the acts of April 29, 1902 (32 Stat., 176), and April 27, 1904 (33 Stat., 394, 428), provides that:

> * * * It shall not be lawful for any Chinese laborer to come from any foreign port or place, or having so come to remain within the United States.

Section 12 of the act of May 6, 1882 (22 Stat., 58), as amended by the act of July 5, 1884 (23 Stat., 115), provides:

> That no Chinese person shall be permitted to enter the United States by land without producing to the proper customs officer [Chinese inspector] the certificate in this act required of Chinese persons seeking to land from a vessel.
>
> And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or to remain in the United States. * * *

Section 7 of the act of September 13, 1888 (25 Stat., 477), reenacted by the acts of April 29, 1902 (32 Stat., 176), and April 27, 1904 (33 Stat., 394, 428), provides:

> * * * And no Chinese laborer shall be permitted to reenter the United States without producing to the proper officer of the customs [proper officer in charge] at the port of such entry the return certificate herein required. A Chinese laborer pos-

R COPY

> sessing a certificate under this section shall be admitted to the United States only at the port from which he departed therefrom, and no Chinese person, except Chinese diplomatic or consular officers, and their attendants, shall be permitted to enter the United States except at the ports of San Francisco, Portland, Oregon, Boston, New York, New Orleans, Port Townsend, or such other ports as may be designated by the Secretary of the Treasury [Commerce and Labor].

Section 13 of said act of 1888, likewise reenacted by the above-mentioned acts of 1902 and 1904, provides:

> That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. * * *

The following rules have been issued by the Department of Commerce and Labor governing the admission of Chinese.

> RULE 1. No Chinese person, other than a Chinese diplomatic or consular officer and attendants, shall be permitted to enter the United States elsewhere than at the ports of San Francisco, Cal.; Portland, Oreg.; Bos-

ton, Mass.; New York, N. Y.; New Orleans, La.; Port Townsend and Seattle, Wash.; Honolulu, Hawaii; San Juan and Ponce, P. R.; San Diego, Cal.; and Tampa, Fla.

RULE 3. Chinese aliens shall be examined as to their right to admission to the United States under the provisions of the law regulating immigration as well as under the laws relating to the exclusion of Chinese. As the immigration act relates to aliens in general, the status of Chinese applying for admission must *first* be determined in accordance with the terms of that law and of the regulations drawn in pursuance thereof; then, if found admissible under such law and regulations, their status under the Chinese-exclusion laws and regulations shall be determined. In order to avoid inconvenience, delay, or annoyance to Chinese applicants arising through misunderstanding, and in the interest of good administration, examination under both sets of laws and regulations shall be made, in the order stated, only at the ports named in rule 1 hereof.

○